SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 192

WILLIS E. GIESE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 72034

Charge Vio. Sel. Tr. & Serv. Act of 1940, as Amended

UNITED STATES OF AMERICA

vs.

WILLIS E. GIESE

DOCKET ENTRIES

1943

May 24. Presentment and indictment filed.
28. Arraigned, Plea Not Guilty.
Deft. waives right to trial by jury.

1944

Feb. 7. Deft. waives right to trial by jury.
Trial by Court proceeds.
Finding Guilty as indicted.
Case referred to the Probation Officer of the Court.
Deft. remains on bond.
Waiver of jury trial filed.
25. Sentenced to Imprisonment for period of 3 months to three years.
Defendant committed.

Clerk's Certificate to foregoing docket entries omitted in printing.

[fol. b] IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL

(Name and address of appellant) Willis E. Giese, Dupont Circle, Washington, D. C. (Name and address of appellant's attorney) Edmund D. Campbell, Southern Bldg., Washington, D. C.

Offense: Violation of Selective Training and Service Act of 1940 as amended.

Date of judgment: February 25, 1944.

Brief description of judgment or sentence: Sentence three months to three years.

Name of prison where now confined, if not on bail: District of Columbia jail.

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

Willis E. Giese, Appellant. Edmund D. Campbell, Attorney for Appellant.

Date: February 25 ,1944.

GROUNDS OF APPEAL

The evidence at the trial showed that defendant was classified as 1A (on which classification the order to report for induction was made) by an agency of appeal not composed of civilians, but of military officials, in violation of the Selective Training and Service Act, and hence that defendant had never been classified or ordered to report for induction according to law; and the court erred in overruling defendant's motion for a finding of not guilty.

[fol. c] [Caption omitted]

[fol. 1] IN UNITED STATES DISTRICT COURT

G. J. No. 27,762.
Criminal No. 72034.
Violation Selective Training and Service Act of 1940, as amended.

INDICTMENT—Filed in Open Court May 24, 1943

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

April Term, A. D. 1943

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That on or before, to wit, the tenth day of March, 1943, one Willis E. Giese, was a person subject to the provisions of the Selective Training and Service Act of 1940, as amended, and the rules and regulations prescribed thereunder; that on, to wit, the twenty-seventh day of February, 1943, the said Willis E. Giese was ordered to report for induction into the armed forces of the United States on the tenth day of March, 1943, at the Selective Service Headquarters for the District of Columbia located at 2227 M Street, Northwest, a place at and within the District of Columbia, under the provisions of the aforesaid act and the rules and regulations aforesaid; and it thereby became and was the duty of the said Willis E. Giess to present himself for induction into the armed forces of the United States on the date and at the place aforesaid, and on the said tenth day of March, 1943, and at and within the District of Columbia aforesaid, the said Willis E. Giess knowingly, wilfully, unlawfully and feloniously did refuse, fail and neglect to report for induction into the armed forces of the United States; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Edward M. Curran, Attorney of the United States in and for the District of Columbia.

A True Bill: William D. Ellett, Foreman.

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ARRAIGNMENT AND PLEA—May 28, 1943

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Edmund D. Campbell, Esquire; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon the defendant waives his right to trial by jury.

[fol. 3] IN UNITED STATES DISTRICT COURT

WAIVER OF JURY TRIAL—Filed February 7, 1944

Having been duly advised of my rights to a trial by jury I hereby waive a trial by jury and request a trial by the Court.

Willis E. Giese.

Approved: Edmund D. Campbell, Attorney.

I consent: John C. Conliff, Jr., Asst. U. S. Atty.

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

JUDGMENT—February 7, 1944

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance and by his attorney, Edmund D. Campbell, Esquire; and thereupon the said defendant waives right to trial by jury, which trial proceeds; whereupon it is the judgment of the Court that the defendant is guilty in manner and form as charged in the indictment; thereupon the case is referred to the Probation Officer of the Court, and the defendant is permitted to remain on bond pending sentence.

[fol. 5] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SENTENCE—February 25, 1944

Come as well the Attorney for the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Edmund D. Campbell, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that for his said offense the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) months to Three (3) years.

[fol. 6] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

Bill of Exceptions—Filed March 3, 1944

Be it remembered that heretofore the Grand Jury of the United States in and for the District of Columbia did find and return to and before the above entitled court its indictment against the defendant Willis E. Giese; and that at the April 1943 Term of the District Court of the United States for the District of Columbia, Criminal Division, the said defendant was on the 28th day of May, 1943, then and there arraigned in person, his attorney being present, and pleaded not guilty to said indictment.

APPEARANCES

Thereafter, at the January 1944 Term of said court, and on the 7th day of February, 1944, the above entitled cause came on for trial before the Honorable David A. Pine, one of the judges of said court. John C. Conliff, Jr., Assistant United States Attorney, and Lt. Col. F. Cleveland Hedrick,

Jr., of the United States Army, admitted to the bar of said court for the purpose of appearing in this cause, appeared as counsel for the United States, and Edmund D. Campbell, Esquire, appeared as counsel for the defendant.

WAIVER OF JURY TRIAL

The defendant personally and through his counsel in writing waived his right to a trial by jury and moved that [fol. 7] the trial be had by the court and without a jury. Counsel for the United States consented to the motion, which was granted by the court.

SUMMARY OF EVIDENCE

The United States thereupon proved, by competent testimony, the following:

The defendant duly registered in the District of Columbia under the Selective Training and Service Act of 1940 on October 16, 1940. He submitted questionnaire pursuant to said Act and rules and regulations issued thereunder on February 14, 1941. He was duly classified in classification 1A by Local Board No. 2 of the District of Columbia, on March 6, 1941. On March 10, 1941, defendant noted an appeal from the classification of said Local Board to the District of Columbia Appeal Board, and on April 10, 1941, the defendant filed Form 47 under the Act and regulations, claiming to be a conscientious objector. The District of Columbia Appeal Board, pursuant to the Act and regulations thereupon referred the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. The Department of Justice assigned the matter to E. Barrett Prettyman, Esquire, as hearing officer. Said hearing officer, after considering the matter, duly filed his report which was offered in evidence and which read in part as follows:

> "This is a close case. In fact it is typical of the most difficult cases which arise in hearing and deciding upon a recommendation in these cases. This registrant is obviously a sincere, active, even aggressive, pacifist. He was active in a peace movement at college many years ago, and joined the War Resisters League, according to the record, in 1934, and was writing pacifist's editorials in 1934 and 1935. But there is nothing to

indicate that this attitude arose because of any religious training or belief on his part.

[fol. 8] "He attended Sunday School and belonged to the Christian Endeavor Society when he was young but has taken no interest in any religious affairs since his youth, although he is now 35 years old. Also he shows that he wrote a Christmas editorial, emphasizing the relationship between the Christian dostrines and pacifism. But these are normal activities of any school boy or college man, and standing alone, without any active interest shown in later life, certainly do not indicate a religious conviction or belief which would compel a man to take the drastic and important step of refusing to submit to military service. Throughout the file is the constant plea that the registrant be deferred because of his employment and also is the repeated statement of his revulsion at the idea of personally killing a human being. The registrant is intelligent, and at no point stressed the religious phase of his conviction.

"This hearing officer frankly does not believe that Congress intended to exempt a conscientious objector unless the objection was based upon religious training and belief. He does not believe that Congress intended to exempt an objector no matter how sincere or conscientious unless the objection arose from religious training and belief. This Officer also has a feeling that a claimant for exemption has not shown that his conviction is based upon religious training and belief by merely showing that as a boy he went to Sunday School and that as a college student he wrote a Christmas editorial on peace. Thus, laying the question, as he sees it, frankly before the Department of Justice and the Appeals Board, this Hearing Officer recommends [fol. 9] against the allowance of the exemption."

Thereafter the Department of Justice recommended to the District of Columbia Appeal Board that the defendant be continued in classification 1A. On November 5, 1942, the Appeal Board of the District of Columbia continued the defendant's classification as 1A by a unanimous decision, of which action the defendant was duly notified. Thereafter the defendant requested William E. Leahy, Esquire, State Director of Selective Service for the District

of Columbia, to take an appeal to the President from the action of the District of Columbia Appeal Board, pursuant to regulations issued under the Act, and said William E. Leahy, pursuant to said request, did take an appeal to the President from the determination of the defendant's classification by the District of Columbia Appeal Board.

The United States thereupon offered in evidence the following, purporting to be the decision of the President on the above mentioned appeal to the President, which was rendered February 24, 1943:

"Appeal No. 17449

Appeal to the President of the United States

Under the Provisions of the Selective Service Regulations
District of Columbia
Board of Appeal No. 1
Local Board No. 2, District of Columbia
Registrant: Willis Erle Giese
Order No. 398
Classification on Appeal to the President: Class 1-A
This, the 19th day of February 1943.
By Authority of the President (S.) Lewis B. Hershey, Director"

[fol. 10] Counsel for the defendant objected to the admission of said paper in evidence on the ground that it showed on its face that it was not a proper classification under a Presidential appeal within the meaning of the Selective Service Act. The court reserved decision on the objection but overruled the same at the conclusion of the evidence of the United States to which ruling the defendant duly excepted.

The United States thereupon proved, by competent testimony, that the defendant, on February 24, 1943, was duly notified of the above mentioned decision on the appeal to the President, and on February 25, 1943, he was duly notified by Draft Board No. 2 to report for induction on March 10, 1943. The defendant failed and refused to report for induction on March 10, 1943, or at any time thereafter.

Defendant's Evidence

Thereupon the defendant, to maintain the issues on his part joined, called as a witness General Lewis B. Hershey,

who had been duly subpoenaed, but who was unavoidably unable to be present in court on the day for trial. It was then stipulated by and between counsel for the Government and counsel for the defendant that the following might be received as the substance of the testimony which said Lewis B. Hershey would give, if present, subject to the Government's objections as to the relevancy of said testimony.

"I am Director of Selective Service and was Director of Selective Service during the time involved in this appeal. I am and was at that time an officer of the United States Army on active duty, assigned to the Selective Service System, and as such detached from duty in the War Department. The entire file in the appeal to the President of Willis E. Giese, Order No. 398, Local Board No. 2, District of Columbia, taken by the State Director of Selective Service for the Dis- [fol. 11] trict of Columbia, from the 1-A classification of Board of Appeals No. 1, District of Columbia, was forwarded to the Director of Selective Service as required by Section 628.4 (c), Selective Service Regulations. The entire file was reviewed by six members of my staff who are assigned to a Board of Review established within the Selective Service System, known as the Planning Council, to consider Presidential appeals and make recommendations to me concerning them. These men made recommendations to me concerning the disposition of this appeal. Five of these men are members of the Officers Reserve Corps of the Army of the United States. The other is an officer in the United States Naval Reserve. All of these men had been ordered to active duty, but had been assigned to the Selective Service System, a civilian agency functioning under the Chairman of the War Manpower Commission, as authorized under Section 10 (a)(3) of the Selective Training and Service Act of 1940 as amended. The entire file, together with the recommendations of these men, was forwarded to me. On February 19, 1943, after considering the entire file and above-mentioned recommendations, and acting by authority of the President and as Director of Selective Service, I signed the decision and appeal to the President, No. 17449, retaining Willis E. Giese in Class 1-A. The practice of writing explanatory decisions on appeals

to the President has not been followed since September, 1942. Therefore, no such explanatory decision was written in this case".

[fol. 12] The court overruled the objection of the Government and admitted the testimony.

Thereupon the defendant rested.

The foregoing evidence on the part of the United States and on the part of the defendant was all of the evidence offered or given in the proceeding which is necessary to present questions of law involved in the rulings of the court, to which exceptions have been reserved in this proceeding.

MOTION FOR FINDING OF NOT GUILTY AND DENIAL THEREOF

Thereupon the defendant by his counsel moved the court to make a finding of not guilty upon the ground that the United States had failed to prove that the defendant had violated any lawful order to report for induction, in that the procedural steps necessary as a condition precedent to a lawful order to report for induction had not been followed and completed; that the evidence showed that defendant was classified as 1A (on which classification the order to report for induction was made) by an agency of appeal not composed of civilians, but of military officials in violation of the Selective Training and Service Act, as amended, and hence that defendant had never been classified on his appeal to the President or ordered to report for induction according to law. The motion of the defendant was denied by the court, to which ruling defendant by his counsel then and there excepted. In denying motion of the defendant the court orally expressed its opinion as follows:

"As I read the Falbo case (*Falbo* v. *United States*, 88 L. Ed. 248, decided Jan. 3, 1944) I am of the opinion that under the law announced therein, this defendant cannot raise the question of alleged invalidity of the decision of the President acting through General Hershey as a defense to this indictment. But assuming, arguendo, that I am wrong about that, I am also of the [fol. 13] opinion that the President was under no necessity to act through civilians when an appeal was taken to him.

"I think the provision of the statute which requires that the President appoint civilians to agencies of appeal refers to those agencies of appeal which are set up for receiving and considering and deciding appeals, and not to any officers, be they civilians or persons in the military or naval establishment, who are called upon by the President to assist him in the performance of his duty.

"I think a cogent argument on that point can be made when you consider that there is no express provision in this statute for an appeal to the President.

"Under these circumstances, Mr. Campbell, I deny your motion".

Finding of Guilty

Thereupon the court found the defendant guilty as charged.

Sentence and Judgment

Thereupon on the 25th day of February, 1944, the court rendered its sentence and judgment upon said finding, which sentence and judgment is as follows:

"That the defendant serve from three months to three years in a penitentiary."

Judge's Approval of Bill of Exceptions

And now in furtherance of justice and that right may be done the defendant Willis E. Giese tenders and presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled and allowed and signed and sealed by the court, and made a part of the record, and the same is accordingly done, now for then, this 3d day of March, 1944.

David A. Pine, Justice.

We consent to the foregoing bill of exceptions.
Edward M. Curran, United States Attorney J. C. C.
Edmund D. Campbell, Attorney for defendant.

[fol. 14] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 3, 1944

The appellant Willis E. Giese assigns the following errors in the above entitled cause:

1. The court erred in admitting in evidence Exhibit #3 offered by the United States.
2. The court erred in overruling the motion of the defendant for a finding of not guilty.
3. The court erred in finding the defendant guilty under the evidence.

Edmund D. Campbell, Southern Building, Washington, D. C., Attorney for Willis E. Giese, Appellant.

[fol. 15] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed March 3 1944

The appellant Willis E. Giese designates the following as the record on appeal in the above cause:

1. Indictment.
2. Minute entry of pleas of not guilty, May 28, 1943.
3. Minute entry, waiver of jury trial, February 7, 1944.
4. Written waiver of jury trial signed by defendant and his counsel.
5. Minute entry, finding of guilty by the court, February 7, 1944.
6. Minute entry of sentence, February 25, 1944.
7. Bill of Exceptions.
8. Assignment of Errors.

9. This Designation.

10. Certificate of Clerk.

Edmund D. Campbell, Southern Building, Washington, D. C., Attorney for Willis E. Giese, Appellant.

Mch. 3, 1944. Approved. David A. Pine, Justice.

[fol. 16] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 17] In United States Court of Appeals for the District of Columbia, April Term 1944

No. 8702

Willis E. Giese, Appellant,

vs.

United States of America, Appellee

Minute Entry of Argument—May 10, 1944

Argument commenced by Mr. Edmund D. Campbell, attorney for appellant, continued by Mr. Charles B. Murray, attorney for appellee, and concluded by Mr. Edmund D. Campbell, attorney for appellant.

* * * * * * *

[fol. 18] In United States Court of Appeals, District of Columbia

No. 8702

Willis E. Giese, Appellant

v.

United States of America

Appeal from the District Court of the United States for the District of Columbia

Decided June 19, 1944

Mr. Edmund D. Campbell, for appellant.

Mr. Charles B. Murray, Assistant United States Attorney, with whom Messrs. Edward M. Curran, United States

Attorney, and John C. Conliff, Jr., Assistant United States Attorney were on the brief, for appellee.

Before Groner, Chief Justice, and Miller and Arnold, Associate Justices.

OPINION—Filed June 19, 1944

MILLER, Associate Justice:

Section 11 of the Selective Training and Service Act [1] makes it a crime for any person knowingly to fail or neglect to perform any duty required of him, under or in execution of the Act, or rules or regulations made pursuant to it. From a judgment of conviction under the Act this appeal was taken.

The following facts are undisputed: (1) Appellant's local Selective Service Board in the District of Columbia issued an order which directed him to report for induction;[2] (2) he failed and refused to obey the order; (3) he acted knowingly and with the deliberate intention of disobeying the order. Under the circumstances, all the necessary elements of criminality were present and appellant was guilty as charged in the indictment unless an affirmative answer to each of his three following contentions is required. Those contentions are that: (1) It was his privilege, by way of defense to the accusation in the present criminal case, to [fol. 19] challenge the validity of the order issued by the local board, requiring him to report for induction; (2) the order was void and ineffective; (3) hence it created no duty which he was required to perform, within the meaning of the statute.

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[1] Act of September 16, 1940, 54 Stat. 894, 50 U. S. C. A. §311: "Any person * * * who * * * evades registration or service in the land or naval forces or any of the requirements of this Act * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *"

[2] See Selective Service Regulations, Nos. 633.1 *et seq.*

In *Falbo* v. *United States*,[3] the Supreme Court, upholding a conviction in a similar case, rejected appellant's first contention. It said: "Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. • • • The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. *The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created.*" [Italics supplied] Appellant seeks to avoid this decisive language by distingishing the *Falbo* case on the theory that it "did not pass upon the validity of any conviction based on an order in which the statutory procedural requirements themselves had not been complied with." The language of the decision in that case, concerning this point, when read in its context, provides no support for appellant's contention. It reads: "To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. *But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin* v. *Mott*, 12 Wheat. 19, 30. *Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.* Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts *permits no other inference than that Congress did not intend they could be made.*"[4] [Italics supplied in part]

The only distinction between the *Falbo* case and the present one lies in the reasons asserted to show invalidity of the local board's order. In the *Falbo* case the reason as-

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[3] 320 U. S. 549, 554.

[4] Falbo v. United States, 320 U. S. 549, 554-555.

serted was that the local board's order followed an erroneous classification made by it. In the present case the reason asserted is that the local board's order followed a classification erroneously made by a non-civilian appeals agency, hence that appellant's appeal to the President was still pending and the board was prohibited from issuing its order to report.[5] But in each case the order which constituted the basis of the criminal charge was made by the proper local board in the form prescribed by the applicable regulation and was valid on its face. Whatever the reason for its alleged invalidity or impropriety, the order was not subject to judicial review in the manner attempted by Falbo in his case or by appellant in the present case. The Supreme Court's language in the *Falbo* case is equally applicable here.

[fol. 20] It is contended, also, that denial to appellant of this defense resulted in an unconstitutional deprivation of judicial due process. This argument was made and rejected in the *Falbo* case.[6] The cases of *Panama Refining Co.* v. *Ryan*,[7] *Wichita Railroad & Light Co.* v. *Public Utilities Commission*,[8] and the *Morgan* cases,[9] upon which appellant relies, were not criminal cases and do not even suggest that due process requires judicial review of administrative action by way of defense in a criminal trial. But the short answer to this contention is that—assuming a right in appellant to judicial review—denial to him of the defense in a criminal trial did not cut off that right. His appropriate

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[5] Selective Service Regulations, No. 628.7.

[6] Falbo v. United States, 320 U. S. 549, 554.

[7] 293 U. S. 388, 432: "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." There was no such requirement in the present case.

[8] 260 U. S. 48, 59.

[9] Morgan v. United States, 298 U. S. 468; Morgan v. United States, 304 U. S. 1; United States v. Morgan, 313 U. S. 409.

remedy to vindicate whatever right he may have had was recognized by implication in the *Falbo* case [10] and directly in *Billings* v. *Truesdell*,[11] *i.e.*, by writ of *habeas corpus*. The important consideration of the present case is that Congress deliberately and properly declined to authorize interference, by intermediate challenges, with the administrative process which it set up for mobilizing national manpower in the shortest practicable period. Criminal prosecution for failure to obey a local board's order was intended to expedite that process, not to delay it. So long as there remained available, to persons situated like appellant, remedial procedure for challenging the validity of the administrative process there was no denial of constitutional rights.

The law knows a number of situations in which, even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience. Thus, it is his duty to submit to arrest, upon a warrant valid on its face, even though the warrant may turn out later to be invalid.[12]

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[10] Falbo v. United States, 320 U. S. 549, 557. In his dissenting opinion, Mr. Justice Murphy said: "The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed in the absence of legislation to the contrary. Otherwise the absence of clear statutory permission would preclude court review of induction orders in habeas corpus proceedings following actual induction, a result which this Court's opinion presumably does not intend to infer. Judicial review in such proceedings has become well settled in lower federal courts."

[11] (No. 215, decided March 27, 1944) — U. S. —.

[12] See generally, Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201; Barrett v. United States, 62 App. D. C. 25, 26, 64 F. (2d) 148, 149: In other words, if the officer has reason to believe that the person he is about to arrest is a desperate character and acts accordingly, the officer is not to be convicted of assault because it subsequently develops that he was mistaken."; United States v. Rice, 27 Fed. Cas. 795, No. 16,153; United States v. Thompson, 28 Fed. Cas. 89, No. 16,484; Reilly v. United States Fidelity & Guaranty Co., 9 Cir., 15 F. (2d) 314; Erskine v. Hohnbach, 81 U. S. 613, 616. See Matthews v. Densmore, 109 U. S. 216, 219; Hofschulte v. Doe, N. D. Cal., 78 F. 436, 442; Snyder v. Hausheer, 8 cir., 268 F. 776, 780; Bohri v. Barnett, 7 cir., 144 F. 389.

A citizen who resists arrest under such circumstances may subject himself to punishment for so doing, in spite of his complete innocence of the original accusation upon which [fol. 21] the warrant was issued.[13] So, also, one who is held upon a commitment, valid on its face, may be guilty of escape if he forces his way out of custody,[14] even though the commitment, when properly challenged, may prove to be insufficient.[15] Again, one who is a fugitive from a State in which he is unjustly accused of crime may, nevertheless, be subjected to extradition if the indictment and requisition are in proper form.[16] And he may become guilty of a crime, under the federal law, merely by fleeing to another State to escape prosecution.[17] Congress has not acted unreasonably, therefore, in requiring that the procedure which it has established for the selection, classification and induction of men into the armed forces in time of war shall not be interrupted by intermediate judicial review. In the present case, as in those used for comparison in this paragraph, there was legal process, valid on its face; namely, an order of appellant's local board requiring him to report. In the present case, as in those used for comparison, a remedy was available—appropriate both as to time and purpose—to challenge the validity of the order. No more is necessary to satisfy the requirements of due process.

In view of our rejection of appellant's first contention it is not necessary to consider his second and third. However, it may be noted that our conclusion is strengthened in this respect by the decision of the Supreme Court in *Bowles* v. *United States*.[18] The facts of that case are practically

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[13] 18 U. S. C. A. §245; D. C. Code (1940) §33-414(n). Under such circumstances the arresting officer may use sufficient force to prevent escape, in some cases even to the extent of killing the person who resists arrest: Stinnett v. Virginia, 4 Cir., 55 F. (2d) 644, 646-647; United States v. Rice, 27 Fed. Cas. 795, No. 16,153.

[14] 18 U. S. C. A. §753h.

[15] Aderhold v. Soileau, 5 Cir., 67 F. (2d) 259.

[16] Munsey v. Clough, 196 U. S. 364, 373; Hogan v. O'Neill, 255 U. S. 52, 55; 18 U. S. C. A. §§652, 662. See Marbles v. Creecy, 215 U. S. 63, 67.

[17] 18 U. S. C. A. §408e.

[18] 319 U. S. 33.

identical with those of the present case. In his petition for rehearing Bowles urged, as does appellant here, that the order of the local board was void because it depended upon the action of the Director of Selective Service instead of an agency of appeal composed of civilians. In response to the petition for rehearing the Solicitor General filed a memorandum in which he contended that the use in the Act [19] of the words "agencies of appeal" was not intended to apply to or include the Director of Selective Service when he, by authority of the President, renders decisions on appeals to the President.[20] The Supreme Court denied a rehearing [fol. 22] without opinion.[21] If the question is still open it is one which will be appropriate for decision in a proper case, following compliance with an order to report; but it does not call for consideration or decision in the present case.

Affirmed.

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[19] Selective Training and Service Act 1940, 54 Stat. 893, 50 U. S. C. A. § 310(a)(2).

[20] *Cf.* United States v. George S. Bush & Co., Inc., 310 U. S. 371, 379-380: "Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. . . . And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review."; Employers Group of Motor Freight Carriers, Inc. v. National War Labor Board, (No. 8680, decided June 2, 1944) U. S. App. , F. (2d)

[21] Bowles v. United States, 319 U. S. 785.

DISSENTING OPINION

GRONER, C. J., dissenting:

Appellant was indicted and found guilty of a violation of the Selective Service Act of 1940. On the 16th of October, 1940, he registered in the District of Columbia and on March 6th, 1941, was classified 1-A by his Local Board. Within the required time thereafter he appealed to the District of Columbia Appeal Board, claiming to be a conscientious objector. His claim in this respect was transmitted to the Department of Justice, in accordance with regulations, and referred by the Department to Mr. E. Barrett Prettyman as hearing officer. In due time the latter, though recognizing that Giese was sincerely and aggressively opposed to war, recommended against allowance of the claim on the theory that Congress did not intend to authorize exemption unless,—as was not true in Giese's case—the objection was based on religious training and belief. As the result, the Appeal Board affirmed the Local Board classification. Thereafter Giese, under Regulation 628.1,[1] requested the Director of Selective Service for the District of Columbia to take an appeal to the President. This was allowed and resulted in the following order:

"Appeal No. 17448

Appeal to the President of the United States

"Under the Provisions of the Selective Service Regulations District of Columbia, Board of Appeal No. 1, Local Board No. 2, District of Columbia. Registrant: Willis Erle Giese. Order No. 398. Classification on Appeal to the President: Class 1-A.

"This, the 19th day of February 1943.

"By Authority of the President.

"(S.) Lewis B. Hershey, Director."

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[1] 628.1 (a) "When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid any injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time."

Giese was notified of the President's classification on February 24, 1943, and on February 25th following was notified by Draft Board No. 2 to report for induction on March 10th. He refused to report and was indicted. On his trial, a jury [fol. 23] being waived, General Hershey by stipulation of counsel testified that he was Director of Selective Service at the time of Giese's appeal to the President, and that he was at that time also an officer of the United States Army on active duty assigned to Selective Service; that the appeal was duly received and reviewed by six members of his staff, all of whom were officers of the Army or Navy, assigned by him as a Board of Review to consider Presidential appeals and to make recommendations to him concerning them; that upon receiving the report of the Board he considered the file and recommendation and, by authority of the President, acted thereon and as Director of Selective Service signed the order on Giese's appeal, as it is set out in the forepart of this opinion.

Counsel for Giese thereupon moved the court to find him not guilty, upon the ground that the United States had failed to prove that he had violated any lawful order to report for induction. The ground of the motion was that the evidence showed that Giese was classified as 1-A by an agency of appeal not composed of civilians, in violation of the Selective Service Act, and hence that he had never been classified according to law, and consequently the order to report was without any foundation of support. The District Court overruled the motion and found Giese guilty and this appeal followed. The argument here is that since General Hershey, an officer of the Army, was the agency of appeal which classified Giese as 1-A, the classification was unlawful and his appeal, consequently, undisposed of, as a result of which the proceedings taken thereafter, including the order of induction issued by the Local Board, were altogether void and of no effect.

So far as I am advised, the question is new,[2] and the answer is by no means free of difficulty. The United States insist that the case of *Falbo* v. *U. S.*, 320 U. S. 549, is controlling, but the point in that case, as I view it, was wholly different from the point in this. All that is held there is that

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[2] A kindred question arose in *Bowles* v. *U. S.*, 319 U. S. 33, but was not passed on by the Court because other grounds requiring affirmance were found.

the Congress has not authorized judicial review "of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing the registrant to report." The question here is whether there is a similar lack of judicial power in a case in which the order to report is challenged on the ground that *no* classification exists and the procedural steps under the law to obtain one are incomplete and pending. Considered in this view, I think there is a striking dissimilarity in the two situations, and I find nothing in the *Falbo* case to indicate that Congress has precluded judicial review in a case of failure in the procedural steps required as a condition to classification. Here, as we have seen, the point made is that the Local Board's order to report for induction was made at a time when the question of the registrant's classification was still pending and undetermined,[3] and this, of course, on the theory that the action of the appeal agency,—i.e. General Hershey—in reclassifying him as 1-A, was wholly *ultra* [fol. 24] *vires* and void. The problem impels recourse to certain of the provisions of the Selective Service Act, as well as to the regulations.

By Section 10(a) of the Act, the President is authorized "to prescribe the necessary rules and regulations to carry out its provisions," and to this end to establish within the System "civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act." But the Act itself (Sec. 10(a) (2)) expressly requires that both appeal boards and agencies of appeal shall be composed of civilians who are citizens of the United States, and paragraph 3, authorizing the President to employ active or retired officers of the Army, Navy, Marine Corps or Coast Guard in carrying out the provisions of the Act, *excepts* from the positions in which they may be so used "local boards, appeal boards, or agencies of appeal estab-

[3] 628.7 of the Regulations provides: "*Appeal to the President stays induction.* The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the President or during the time such an appeal is pending. Any such order to report for induction which has been issued shall be ineffective and shall be canceled by the local board."

lished or created pursuant to" the Act. Plainer words could hardly be found than are contained in these paragraphs to show that *all* appeals in *all* stages of the appeal must, except when the President acts personally, be determined by civilian citizens and not by the Army.

The President, as he had the right to do, authorized, under certain conditions, an appeal to himself from a determination of a State board of appeal, and provided the method and time of taking such appeal.[4] The regulation expressly declares that the local board "shall not issue an order for a registrant to report for induction * * * during the period afforded * * * to take an appeal to the President or during the time such an appeal is pending"; and expressly declared that an order to report issued during either of the periods allowed shall be ineffective and shall be cancelled.

And in the *Bowles* case, *supra,* the Supreme Court recognized these regulations as creating a *de novo* proceeding, as a result of which the acts of the local board and the State board are superseded and the final outcome made to depend upon the action of the President through the agency constituted by him to act for him. In consequence of this the classification originally made by the local board falls and a new classification must be made by the President. This appears to be the method which has been recognized and applied by the Selective Service throughout.

From all of this it would seem to follow that if in the present instance the agency designated by the President to consider the appeal made to him is the "agency of appeal" described in Section 10(a) (2) of the Act, then by the very terms of the Act, it can be constituted only of civilians who are citizens of the United States. That it is such an agency of appeal seems too clear for argument, for, as we have seen, the Act contemplates the establishment of civilian local boards, appeal boards and agencies of appeal as the entire machinery covering the field of induction of citizens into the armed services. That this is correct is confirmed by the fact that after the indictment in this case and after General Hershey had been subpoenaed as a witness, Section 10 of the Act was amended so as thereafter to require civilian personnel *only* on local boards and State boards of appeal, and the Report of the House Com-

[4] Reg. 678.

[fol. 25] mittee [5] shows that the amendment was considered necessary to assure Army and Navy personnel on the Presidential appeal board. I think it cannot be properly contended that the effect of the amendment was to give retroactive operation to the statute as amended. "Retroactive declarations of legislative intent prejudicial to those who have acted under an earlier statute, whose construction seems clear, it would seem ought not to be implied * * *." *Haggar* v. *Helvering*, 308 U. S. 389, 400. Here, as I think, the original statute was clear. As a result of this amendment the law, as it now exists, permits such military personnel to act for the President, but it does not follow that because of it, as is suggested by counsel for the United States, if this case is reversed, Giese would be in precisely the same position he is in now. Obviously, this is incorrect for Giese now faces prison if the judgment of the District Court is affirmed, whereas, if it is reversed, it by no means follows that when a proper board or lawful official delegated to act for the President has acted, Giese will not promptly obey the order to report for induction. But however that may be, the situation here must stand or fall upon the legality of what has happened and not upon what may. Hence it is that the decision ought to rest upon the determination whether, in the facts as shown in this record, Giese violated the law. And if I am correct in thinking that his appeal has never been considered by a legal board and the order of induction made by the Local Board was prohibited by law until his appeal had been legally disposed of, it follows that the Board's order was without effect; and this in turn results from the well established rule that a citizen may not be punished for the violation of the order of an executive officer or board, if it shall appear that the order was not within the authority of the officer or board. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Wichita R. & Light Co.* v. *Pub. U. Comm.*, 260 U. S. 48; *Morgan* v. *U. S.*, 298 U. S. 468, 304 U. S. 1.

The Supreme Court has not hesitated to set aside a conviction in a case in which it was shown that the jury was constituted in part of persons not qualified to perform jury service. *Crawford* v. *U. S.*, 212 U. S. 183. Nor has the Supreme Court hesitated to reverse a conviction obtained on an indictment found by a Grand Jury in communities from

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[5] Report No. 787, H. R. 78th Congress, First Session.

which negroes were systematically excluded, for the reason that such a jury was illegally constituted. *Hale* v. *Ky.*, 303 U. S. 613. Upon equally solid ground it would seem that like action should follow in the facts of this case.

I am accordingly of opinion that Giese was at all times prior to his indictment entitled to have his appeal submitted to an appeals agency composed of civilians, and that his classification for induction in the Army by General Hershey was contrary to the terms of the Act and the regulations, and consequently the induction order of the Local Board was illegal and imposed no obligation, and his refusal to obey constituted no violation of the law.

The view I have taken of the scope and effect of the *Falbo* case is, I think, supported by the view expressed of that case by the First Circuit in *Chih Chung Tung* v. *U. S.*, decided May 24, 1944, which I have just seen. And the reasoning and logic of that decision, in my view, definitely support the conclusions in this dissent.

[fol. 26] In United States Court of Appeals for the District of Columbia, April Term, 1944

No. 8702

Willis E. Giese, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the District of Columbia

Judgment—Filed June 19, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Miller.

Dated June 19, 1944.

Dissenting opinion by Mr. Chief Justice Groner.

[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed June 23, 1944

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Edmund D. Campbell, Attorney for Appellant.

Service of a copy of the foregoing Designation of Record hereby acknowledged this 23rd day of June, 1944.

Charles B. Murray, C., Attorney for Appellee, Asst. U. S. Attorney.

[fol. 28] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 48,645. U. S. Court of Appeals, District of Columbia. Term No. 192. Willis E. Giese, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 26, 1944. Term No. 192 O. T. 1944.